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PP v. SOLICAN CONSTRUCTION SDN BHD

HIGH COURT MALAYA, GEORGETOWN
MOHD RADZI ABDUL HAMID J
[CRIMINAL APPEAL NO: PA-42LB-17-10-2020]
3 JUNE 2022

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Abstract – *Where a charge is brought against an owner of a land for any alleged offence under s. 70A of the Street, Drainage and Building Act 1974, and the prosecution intends to rely on the presumption under s. 70A(14) of the same Act, it is imperative that the works must be proven to have been commenced or carried out after or within the period when the accused is the owner of the land.*

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LOCAL GOVERNMENT: *Licence – Earthworks – Carrying out earthworks on land without approval of local authority – Investigations saw signs of unapproved earthworks on land – Excavator found situated on adjacent land – Whether indicative of earthworks carried out without approval of local authority – Whether land owned by accused – Whether there was certainty as to when earthworks were actually undertaken – Whether presumption of permission for commencement or carrying out earthworks triggered – Street, Drainage and Building Act 1974, ss. 70A(1), (14)*

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An investigation was conducted, following allegations that earthworks were carried out on the land belonging to the respondent, without the approval of Majlis Bandaraya Pulau Pinang. The assistant engineer ('PW2') who investigated, stated that there were signs of unapproved earthworks on the respondent's land which included cutting and levelling of earth and the discovery of an excavator on a land adjacent to the respondent's land. The respondent was charged at the Sessions Court for carrying out earthworks without the approval of local authority, an offence under s. 70A(1) of the Street, Drainage and Building Act 1974 ('Act'). At the conclusion of the prosecution's case, the Sessions Court Judge ('SCJ') held that, *inter alia*, (i) the evidence of PW2 only showed that there were signs of unapproved earthworks on the land but the evidence could not prove that the earthworks were actually done; (ii) there was no evidence of any arrest or seizure of machineries done on the land to prove unapproved earthworks; (iii) given the short period between the date the respondent became the registered owner of the land and the date of the alleged offence, there was doubt as to when the earthworks were actually undertaken; and (iv) the presumption of permission for the unapproved earthworks by the respondent as the owner of the land, under s. 70A(14) of the Act, could not be triggered taking into account the uncertainty as to when the earthworks were actually done and that there was no evidence the respondent had knowledge of the unapproved earthworks. The respondent was acquitted and discharged from the charge. Hence, the present appeal by the prosecution.

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Held (dismissing appeal; affirming decision of Sessions Court):

(1) Section 70A of the Act makes any earthworks, carried out or permitted to be carried out without an approval from the local authority, as illegal work. Section 70A(1) of the Act provides for strict liability offence. Once it is proven that the earthworks were carried out without approval, it matters not if there was a misconstruction on the type of works that actually required an approval of the authority, the offence is then established. Whilst s. 70A(1) of the Act applies to any party *ie*, tenant, lessee, licensee, contractor and the owner of the land, the presumption of permission under s. 70A(14) only applied to an owner of the land. The presumption essentially presumes that an owner of the land had permitted the earthworks without the prosecution having the need to prove that the permission for such works were actually given. Based on the words used in s. 70A(14) of the Act, there are two elements to be proved by the prosecution before relying on the presumption, namely (i) there are or have been earthworks commenced or carried out; and (ii) the ownership of the land by the accused. (paras 19, 21 & 23)

(2) There was no evidence from the prosecution witnesses that they saw unapproved earthworks being carried out and they could not state with certainty that the earthworks were undertaken anytime between 7 May 2018, when the respondent became the registered owner of the land, and 14 May 2018, when the investigation was carried out. The most PW2 could state was that he only saw signs of earthworks having been undertaken. There was no information on the condition of the land prior to 14 May 2018 and it was not known when the earthworks were actually undertaken. In addition, PW2 could not state with certainty that the excavator he saw was, in fact, used on the land. (para 25)

(3) There was a very short period of approximately seven days between the date from when the respondent became the registered owner of the land and the date of the alleged offence. There was uncertainty in the evidence of the prosecution's case whether the earthworks were done before or after the respondent became the owner of the land. The uncertainty left doubts on whether the respondent was responsible for the earthworks. (para 2)

Case(s) referred to:

Abdullah Atan v. PP & Other Appeals [2020] 9 CLJ 151 FC ***(refd)***
Ariff Arhannan Che Udin v. PP [2022] 1 LNS 342 FC ***(refd)***
Dato' Sri Mohd Najib Hj Abd Razak v. PP [2022] 1 CLJ 491 CA ***(refd)***
Gammon (Hong Kong) Ltd & Others v. Attorney-General of Hong Kong [1984] 2 All ER 503 ***(refd)***
Lim Plantation Company Sdn Bhd v. PP [2022] 6 CLJ 532 HC ***(refd)***
Mohd Yusri Mangsor & Anor v. PP [2014] 7 CLJ 897 CA ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
PP lwn. Chew Weng Leong [2015] 1 LNS 1117 HC ***(refd)***

A *PP v. Osman Apo Hamid & Anor [1976] 1 LNS 110 HC* ***(refd)***
PP v. Zulkifli Arshad [2010] 6 CLJ 121 FC ***(refd)***
Siti Aishah Sheikh Abd Kadir v. PP [2014] 1 CLJ 1058 CA ***(refd)***
Weng Lee Granite Quarry Sdn Bhd v. Majlis Perbandaran Seberang Perai [2020] 1 CLJ 34 FC ***(refd)***

B **Legislation referred to:**
Street, Drainage and Building Act 1974, s. 70A(1), (9), (14), (18)

Building Ordinance [HK], s. 40(2B)(b)

For the appellant - Rais Imran Hamid; DPP
For the respondent - Simon Murali; M/s Simon Murali & Co

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[Editor's note: Appeal from Sessions Court; Criminal Trial No: PA-63-69-11-2019.]

Reported by Najib Tamby

JUDGMENT

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Mohd Radzi Abdul Hamid J:

Introduction

[1] This is an appeal by the appellant ("appeal") against the decision of the Sessions Court in acquitting and discharging the respondent at the end of the prosecution's case for a charge under s. 70A(1) of the Street, Drainage and Building Act 1974 ("Act") punishable under s. 70A(9) of the Act with regards to certain earthworks allegedly carried out by the respondent without approval of the local authority on a plot of land owned by the respondent known as Lot 276, Mukim 10, Daerah Barat Daya, Pulau Pinang ("land").

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[2] At the end of the hearing of this appeal, this court dismissed the appeal and affirmed the decision of the Sessions Court. The decision to dismiss the appeal was made premised on the facts that: (i) there was a very short period of approximately seven days between the date from when the respondent became the registered owner of the land on 7 May 2018 and the date of the alleged offence on 14 May 2018; (ii) there was uncertainty in the evidence of the prosecution's case whether the earthworks were done before or after the respondent became the owner of the land; and (iii) that uncertainty left doubts on whether the respondent was responsible for the earthworks. Based on the same considerations, this court also decided that the presumption of permission to carry out the earthworks by the respondent as the owner of the land under s. 70A(14) of the Act cannot operate against it. The reasons for this court's decision are set out below.

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The Charge

I **[3]** The charge ("charge") is as follows:

> Bahawa kamu Solican Construction Sdn Bhd (No. Syarikat: 1145579-M) sebagai pemunya tanah berdaftar bagi Lot 276, Mukim 10, Daerah Barat Daya, Pulau Pinang dipertuduhkan bahawa kamu pada tarikh 14.5.2018

telah didapati membenarkan kerja tanah dijalankan iaitu kerja-kerja pemotongan dan meratakan tanah tanpa mendapat kelulusan terlebih dahulu daripada Pihak Berkuasa Tempatan iaitu Majlis Bandaraya Pulau Pinang dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 70A(1) Akta Jalan Parit dan Bangunan 1974 dan boleh dihukum di bawah seksyen 70A(9) Akta yang sama.

Brief Facts Of The Trial

[4] It was not disputed that the respondent became the registered owner of the land on 7 May 2018. On 14 May 2018, PW2 (assistant engineer) had undertaken an investigation on alleged earthworks being undertaken on the land without the approval of the local authority, namely the City Council of Penang Island ("MBPP"). Later, on 10 October 2018 and 17 October 2018, PW4 visited the area to undertake a survey of the land.

[5] In his evidence, PW2 stated that on 14 May 2018, he saw signs of unapproved earthworks involving cutting and levelling of earth on the said land. He used a drone to capture images of the area to evidence the unapproved earthworks and the images were tendered as exhs. P1(a) to (e). PW2 also stated in his evidence that there was an excavator situated on a land adjacent to the land which he believed to be indicative of the earthworks that were done on the land. In his evidence, PW4 (surveyor) stated that he had observed changes on the land indicative of some levelling works had been done.

[6] It was argued for the respondent at the trial that PW2 could not state with certainty when the alleged unapproved earthworks were done, before or after the respondent became the owner of the land. All PW2 saw were signs of earthworks that had been undertaken but did not witness any earthworks actually being undertaken on 14 May 2018. In addition, the images in exh. P1 did not show any excavator as claimed by PW2. Therefore, there was no evidence that the respondent was responsible for the earthworks.

Decision Of Trial Court

[7] At the end of the prosecution's case, the learned Sessions Court Judge ("SCJ") found that the prosecution had failed to prove a *prima facie* case against the respondent based on the following reasons: (i) contradiction between the evidence of PW1 and the particulars in the charge, where in his evidence, PW1 stated that based on the images taken there were signs of cutting of slopes and excavation of land when the charge only referred to cutting and levelling of earth; (ii) the evidence of PW2 only showed that there were signs of unapproved earthworks on the land but could not prove when the earthworks were done; (iii) there was no evidence of any arrest or seizure of machineries done on the land on 14 May 2018 to prove that

unapproved earthworks were being done on that date; (iv) given the short period between the date the respondent became the registered owner of the land and the date of the alleged offence, there was a doubt when the earthworks were actually undertaken; (v) there was no image of any excavator on the land in exh. P1 as claimed by PW2; (vi) there was no report or document to prove when the unapproved earthworks were carried out; and (vii) the presumption of permission for the unapproved earthworks by the respondent as owner of the land under s. 70A(14) of the Act cannot be triggered taking into account the uncertainty as to when the earthworks were actually done and that there was no evidence the respondent had knowledge of the unapproved earthworks.

Hearing Of The Appeal

Submissions by Appellant

[8] It was the appellant's contention that an offence under s. 70A(1) of the Act is one of strict liability and as such the consideration of *mens rea* or intention of an accused person is not an element in proving a charge under the said law. Thus, for as long as the prosecution proves that the earthworks were undertaken without any approval of MBPP, the offence is thus proven against an accused irrespective of whether the accused lacked any intention to cause or undertake any works that would otherwise require an approval of MBPP. Reference was made to the decision in *PP v. Osman Apo Hamid & Anor* [1976] 1 LNS 110; [1978] 2 MLJ 38; *Gammon (Hong Kong) Ltd & Others v. Attorney-General of Hong Kong* [1984] 2 All ER 503 and *PP lwn. Chew Weng Leong* [2015] 1 LNS 1117; [2015] MLJU 1238. in *Osman Apo Hamid* (*supra*) Abdul Razak J (as he then was) held that the Lembaga Padi dan Beras Negara (Restriction of Movement) Terengganu Regulation *vide* P.U.(A) 320/71 had imposed a strict liability offence on the accused to not transport bags of rice in excess of what was permitted by the director general:

> ... In my view the offence is one of strict liability in which the mental element is negatived by the legislature. I have no doubt that the legislature intended that the category of physical acts of this nature must itself constitute an offence if only because the alternative would mean that the apprehension of offences of this nature would be well nigh difficult if not impossible. The creation of absolute offences is not new. *Indeed Sweet v. Parsley* [1970] AC 132 which I shall refer to takes cognisance of this fact. Lord Reid at page 148 says:
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> > Our first duty is to consider the words of the Act: if they show a clear intention to create an absolute offence that is an end of the matter.
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> In other words, Widgery L.J., was saying that short of any third party intervention once it is established that the defendant has caused the pollution he is liable regardless of whether he had knowledge of the

defect or whether he had been negligent or not. He was clearly stating in terms that the mental element or *mens rea* has no relevance or consequence in such type of offence where the legislature expressly provides that the offence is committed by the commission of the physical act. Considering the scope and extent to which the court nevertheless was prepared in that case to consider a statute as excluding *mens rea* especially bearing in mind that the word "cause" therein was inextricably linked with the word "knowingly" connotating thereby the requirement of mens rea, how could it ever be said that in our case which is not even remotely near those words and phrases it was not intended to exclude the mental element of *mens rea*. Bearing in mind also that the act contemplated is the act of the defendant or the doer himself and not unlike *Sweet v. Parsley* or that in *Alphacell Ltd. v. Woodward* the act or omission of the defendant's servant or agent.

[9] In *Gammon (Hong Kong) Ltd (supra)*, the Privy Council hearing an appeal touching on the issue whether s. 40(2B)(b) of the Hong Kong Building Ordinance (revised edition 1981) imposed a strict liability offence on deviations to work that was approved by the authorities held:

In their Lordships' opinion, the law relevant to this appeal may be stated in the following propositions (the formulation of which follows closely the written submission of the appellants' counsel, which their Lordships gratefully acknowledge): (1) there is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is 'truly criminal' in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

[10] It was further submitted that by the fact the earthworks were undertaken without approval from MBPP and the ownership of the land by the respondent was not in dispute, the prosecution had satisfied the requirements for the presumption under s. 70(A)(14) of the Act to be triggered. That provision of the Act states:

Where any earthworks are commenced or carried out, the owner of the land on which such earthworks are commenced or carried out shall be deemed to have permitted such earthworks to be commenced or carried out.

[11] Following that, it was argued that the deeming provision in that provision gave the effect that by proving: (i) that the earthworks were undertaken without approval from MBPP; and (ii) the respondent's

ownership of the land, the respondent must be taken to have permitted the commencement or carrying out of the earthworks. On that premise, the learned SCJ have found that a *prima facie* case was made out against the respondent and the respondent should have been ordered to enter its defence to the charge.

Submissions By Respondent

[12] In countering the issues raised by the appellant, the respondent submitted the fact of the very short period between the date of ownership of the land and the date of the alleged offence must be given full consideration, more particularly when PW2 could not be certain when the alleged unapproved earthworks were carried out. That uncertainty must be construed in favour of the respondent. Both PW2 and PW4 only saw signs of earthworks on the land but could not be certain when they were undertaken.

[13] In relation to the application of the presumption under s. 70A(14) of the Act, it was contended for the respondent that notwithstanding the deeming provision in that section, it was still incumbent upon the prosecution to prove that there was in fact earthworks commenced or carried out on 14 May 2018 as specified in the charge. Without the evidence of the *actus reus* on that date the action of carrying out earthworks were not proven and therefore the presumption cannot be triggered. Thus, the Sessions Court was correct in arriving at its decision to acquit and discharge the respondent without calling for defence.

Issue To Be Determined

[14] After hearing arguments of both parties to this appeal, this court found that the central issue in this appeal was whether by proving: (i) that the earthworks were carried out without approval of MBPP; and (ii) the land is owned by the respondent, the prosecution had satisfied the requirement of s. 70A(14) of the Act to trigger the presumption of permission for the commencement or carrying out of the earthworks against the respondent notwithstanding the uncertainty as to when the earthworks were actually undertaken.

The Law Relating To Appeals

[15] In *Mohd Yusri Mangsor & Anor v. PP* [2014] 7 CLJ 897; [2014] 4 MLJ 875, Mohd Zawawi Salleh JCA (as he then was) had clearly set out the principles pertaining to the powers of an appellate court:

> [4] ... We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions. Where:

(a) the judgment is based upon a wrong premise of fact or of law;

(b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course of events affirmed by the trial judge could not have occurred;

(e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

(f) the trial judge had so fundamentally misdirected himself that one may safely sat that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned,

then an appellate court will intervene to rectify that error so that injustice is not occasioned (see *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 4 MLJ 149 (CA); *Sivalingam a/l Periasamy v. Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA)).

Deliberations By This Court

On Section 70A Of The Act

[16] Section 70A(1) and (9) of the Act states as follows:

(1) No person shall commence or carry out or permit to be commenced or carried out any earthworks without having first submitted to the local authority plans and specifications in respect of the earthworks and obtained the approval of the local authority thereto.

...

(9) Any person who contravenes any provision of this section or fails to comply with any direction or order given under this section or does any act to obstruct in any manner whatsoever the entry or the execution of any work authorised to be effected or executed under this section by or on behalf of the local authority shall upon conviction be guilty of an offence and shall be liable to imprisonment for a term not exceeding five years or to a fine not exceeding fifty thousand ringgit or to both, and in the case of a continuing offence to a fine which may extend to five hundred ringgit for every day during which the offence is continued.

[17] Section 70A(18) of the Act defines "earthworks" as follows:

In this section and in any by-laws made thereunder the word "earthworks" includes any act of excavation, levelling, filling with any material, piling, the construction of foundations, or felling of trees, on any land, or any other act of dealing with or disturbing any land.

[18] In the case of *Weng Lee Granite Quarry Sdn Bhd v. Majlis Perbandaran Seberang Perai* [2020] 1 CLJ 34; [2019] MLJU 1172 the Federal Court had the occasion to deliberate on the objectives and scope of s. 70A of the Act:

> [63] Under the scheme of the 1974 Act, an important point to note is that as the authority responsible for granting earthworks plan approval, the respondent is responsible for controlling, supervising and regulating the manner in which earthworks are carried out and to ensure that the landowner at all times complies with the procedural conditions imposed. This is an important and crucial point which we must look closely.
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> [67] It can be seen from the foregoing analysis that if one looks at the matter as a question of principle and policy, for all intents and purposes, s. 70A relates to the regulation and supervision of earthwork activities. The point which has a strong bearing on this issue is that the approval of earthwork plans is required to enable the respondent as the local authority to control, regulate and supervise operations such as supervision of hill slope cutting, supervision of hill gradients; supervision of cleanliness; supervision of public safety; supervision of the water, silt and sediment flow; and supervision of the boundaries and the interests of adjoining landowners. Since earthworks directly threaten physical harm to persons or property, and may undoubtedly touch on numerous aspects of human life and is capable of giving rise to considerable environmental impacts, as the controlling authority, the respondent is empowered to grant or withhold granting earthworks plan approval or imposing certain legal limitations on the land. Unmistakably, the respondent has a public policy interest in controlling the earthworks.

[19] Therefore, s. 70A of the Act makes any earthwork which were carried out or permitted to be carried out without an approval from MBPP as illegal work. This court had expressed its view in another appeal relating to the same provision (*Lim Plantation Company Sdn Bhd v. PP* [2022] 6 CLJ 532 (Criminal Appeal No: PA-42S-4-03-2021)) that the words "... permit to be commenced or carried out any earthworks ..." are not restricted only to works that are found to being actively carried out on the date of specified in a charge but also includes works that are found by the authorities on that date to have been carried out or permitted to be carried out by the owner of the land or its contractor. As decided in that case it is common knowledge that many earthworks that had consequently caused siltation of rivers and drainage systems which led to floods or that had caused movement of soil which led to landslides were carried out on private lands or by private project developers. Such works were not known to the authorities until disasters happened and investigations carried out. In such cases, if the prosecution is restricted to only proving that the alleged illegal earthworks by the land owner or contractor was undertaken on the date of the disaster then many such parties would be able to escape the provisions of the law unscathed since

the works were undertaken at some earlier date. The objective of s. 70A of the Act to protect the environment and the public against wanton earthworks would then become useless and ineffective. Therefore, in this court's view it must be the intention of the legislators that the provision of s. 70A of the Act as a measure to control illegal earthworks that may pose risks to the environment and the public operates to cover not only illegal earthworks that are found actually being done on the date specified in the charge but also extends to similar works done before its discovery. Only then would the law be effective in deterring would be offenders from committing such offence. There is an element of public safety that the statute wishes to protect. It is sufficient therefore, for the Prosecution to prove that on the date of the charge illegal earthworks were permitted to be carried by the land owner or his contractor whether such works were found actively being carried out on that date or had been carried out and completed at some earlier date. In the latter case, the discovery of the illegal earthworks on the date as specified in the charge would constitute the date of the offence. Thus, in that respect, this court agrees that s. 70A(1) of the Act provides for a strict liability offence. Once it is proven that the earthworks were carried out without approval it matters not if there was a misconstruction on the type of works that actually required an approval of the authority, the offence is then established.

The Presumption Under Section 70A(14) Of The Act

[20] The use of presumptions has been accepted as a legal feature in many statutes in Malaysia, key among them are the Dangerous Drugs Act 1952 and the Malaysian Anti-Corruption Commission Act 2009. The application and legality of presumptions under Malaysian criminal law, in particular the Dangerous Drugs Act 1952 has been discussed in a number of cases including *Muhammed Hassan v. PP* [1998] 2 CLJ 170; [1998] 2 MLJ 273; *PP v. Zulkifli Arshad* [2010] 6 CLJ 121; [2011] 1 MLJ 599; *Abdullah Atan v. PP & Other Appeals* [2020] 9 CLJ 151; [2020] MLJU 1244 and recently *Ariff Arhannan Che Udin v. PP* [2022] 1 LNS 342; [2022] 3 MLJ 157. The cases of *Siti Aishah Sheikh Abd Kadirv. PP* [2014] 1 CLJ 1058; [2013] 6 MLJ 86 and *Dato' Sri Mohd Najib Hj Abd Razak v. PP* [2022] 1 CLJ 491; [2022] 1 MLJ 137 were some of the decisions that discussed the application of presumptions under the Anti-Corruption Act 1997 and Malaysian Ant-Corruption Commission Act 2009. It would be pertinent to quote what was stated by Tengku Maimun Tuan Mat CJ in the case of *Abdullah Atan* (*supra*):

> [56] The fundamental rule in criminal law is that the prosecution must prove every element of the offence charged beyond reasonable doubt, and that the accused bears no onus of proof. This general rule is however subject to exceptions as there is a limit to what the prosecution can reasonably be expected to prove. The English common law authorities codified in our written law affirmatively recognise that it is lawful in certain cases to shift the onus to the accused to exculpate himself in

A certain situations. These situations include defences which relate to facts especially within the knowledge of the accused including the proof of lawful authority; or where a statutory presumption provides that a particular fact is presumed to exist unless the contrary is proved (see *PP v. Gan Boon Aun* [2017] 4 CLJ 41; [2017] 3 MLJ 12; *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780; [2019] 4 MLJ 1; and *Jazlie Jaafar v. PP* [2020] 2 CLJ 28).

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[57] The role of presumptions in the wider context of the criminal legal system may be simplified thus: where a statutory presumption is invoked to presume the existence of certain fact as being the ingredient of the offence, the onus then shifts to the accused to disprove the presumed fact on the balance of probabilities and to thereby exculpate himself from the charge. If he does so, he earns an acquittal. If he does not, he is guilty of the charge.

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[21] Moving on with the deliberation on s. 70A(14) of the Act, it must be noted that whilst s. 70A(1) and (9) of the Act refers to "no person" and "any person", s. 70A(14) of the Act specifically refers to "the owner of the land". Therefore, whilst s. 70A(1) of the Act applies to any party such as a tenant, lessee, licensee, contractor and the owner of land, the presumption of permission under s. 70A(14) of the Act only applies to an owner of the land. The presumption essentially presumes that an owner of the land had permitted the earthworks without the prosecution having need to prove that permission for such works were actually given. It can be deduced that the intention of this provision is to place the land owner in a primary position of strict liability for any unapproved earthworks carried out by others as a matter of policy on public safety. The burden of proving that the earthworks were not permitted lies on the owner and is rebuttable on the balance of probabilities.

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[22] Now, before relying on the presumption, it is incumbent on the prosecution to first prove the elements that give rise to the presumption in the first place. On this point, the Court of Appeal in *Dato' Seri Najib Hj Abd Razak* held:

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[97] The learned trial judge quite correctly pointed out that there are two related aspects to this presumption. The first concerns the issue of whether the accused made the decision or was involved in the decision making which is the subject of the charge, and the second is whether the accused had an interest in any such decisions or actions. If the prosecution successfully proves the above two elements, then the s. 23(2) presumption, *ie*, that the appellant used his office for gratification, would apply and the appellant is presumed, until the contrary is proved, to have used his office for gratification ...

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[98] It bears emphasis that s. 23 of the MACC Act is derived from the previous regime of corruption legislation that is, s. 15 of the Anti-Corruption Act 1997. From our observation, there is not much difference in structure as well as the wording in s. 15 of the ACA 1997 and the current s. 23 of the MACC Act, except the following:

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(i) the addition of the words "whether for himself, his relative or associate" in sub-ss. (1) and (2) of s. 23 of the MACC Act; and

(ii) substitution of the words "shall be guilty of an offence" to "commits an offence" in sub-s. (1) of s. 23 of the MACC Act.

Hence, the principles enunciated in case authorities on s. 15(2) of the Anti-Corruption Act are very much applicable to a charge under s. 23(1) of the MACC Act.

[99] That said, the prosecution must prove the following basic facts in order to trigger the application of the presumption under s. 23(2) of the MACC Act:

(i) there is the "making of any decision or taking any action"; and

(ii) such decision or action concerned a matter in which the accused had an interest (directly or indirectly).

The general principle is that, the basic facts constitute prerequisites which must be factually proved prior to invoking any statutory presumption, as was stated by Thomson CJ in *Ng Kim Huat v. PP* [1961] 1 LNS 73; [1961] 1 MLJ 308:

> It is surely elementary to observe that while a statutory presumption when it arises may operate in place of evidence and so reverse the onus of proof on any point, the bare potential existence of such a presumption cannot of itself dispense with proof of any fact the existence of which is a condition precedent of the presumption arising. To say otherwise would be to fly in the face of all the rules of logic.

[23] Therefore in relation to the presumption under s. 70A(14) of the Act, it is this court's view based on the words used, there are two elements to be proved by the prosecution before relying on the presumption, the first element is that there are or have been earthworks commenced or carried out and the second element is the ownership of the land by the accused. In this court's view, the allegation of the unapproved earthworks is connected to and coincides with the fact of ownership, meaning that the earthworks must be proven to have occurred during the ownership of the land by the accused. The presumption is not that the unapproved works were done but that it was done with permission of the owner of the land. Thus, the fact that the works were firstly done whilst the accused is or was the owner must be proved. It would be quite legally insensible to suggest that a party is presumed to have permitted the unapproved earthworks when he was not the owner of the land at the material time.

[24] Thus, the presumption under s. 70A(14) of the Act is not a short cut provision that does away with the need to prove that the earthworks were undertaken during the period of ownership. To the contrary, it asserts the need to prove that fact. In the event the unapproved earthworks are proven

A to have been commenced or carried out during the ownership of the land, the accused is then presumed to have permitted such works and unless that presumption is successfully rebutted on the balance of probabilities, it would not be a defence to the owner to state that he did not consent or permit such works or that it was actually done by some third party such as a tenant, B lessee, contractor or partner in a project on the land.

[25] Now, turning back to the present appeal, there is no dispute that there were sign of earthworks and they could have been unapproved. The issue is whether the respondent responsible for those earthworks? There is no evidence neither from PW2 nor PW4 that they saw unapproved earthworks C being carried out on 14 May 2018 and neither of them could state with any certainty that the earthworks were undertaken anytime between 7 May 2018 when the respondent became the registered owner of the land and 14 May 2018. The most PW2 could state was that he only saw signs of earthworks having been undertaken. PW2 had agreed in cross-examination that there D was no information on the condition of the land prior to 14 May 2018 and he agreed that he did not know when the earthworks were actually undertaken. In addition, he could not with certainty state that the excavator he saw was in fact used on the land (see pp. 37, 39, 40, 43 and 44 vol. 2, additional record of appeal). He only made the assumption that since the E excavator was seen on other lands owned by the respondent adjacent to the land, then that excavator must have been used to carry out the unapproved earthworks. PW4's survey was done some five months later and it could not be safely relied as evidence proving that five months earlier between 7 May 2018 and 14 May 2018 unapproved earthworks were carried out by the F respondent. As stated earlier, in his evidence, PW4 had only observed changes on the land indicative of some levelling works had been done on the same but gave no evidence what caused the changes, when and by whom (see pp. 51 and 52 vol. 2, additional record of appeal), in the final analysis, there were serious doubts whether the unapproved earthworks were commenced or carried out on the land between 7 May 208 and 14 May 2018.

G

Conclusion

[26] In conclusion, this court agrees with the respondent that the presumption could not be triggered in absence of evidence that the unapproved earthworks were commenced or carried out after 7 May 2018. H It must be emphasised that where a charge is brought against an owner of a land for any alleged offence under s. 70A(1) of the Act and the prosecution intends to rely on the presumption under s. 70A(14) of the Act it is imperative that the works must be proven to have been commenced or carried out after or within the period when the accused is the owner of the I land. When the fact of a case is like the one in the present appeal where the alleged offence is said to have been committed within a very short time after

the accused became owner of the land, then the prosecution has a heavier evidential burden in proving its case. This court finds that prosecution in this case had failed to discharge that burden. After reading the learned SCJ's grounds of judgement and hearing arguments of both parties, this court finds no reason to depart from the decision of the Sessions Court in acquitting and discharging the respondent at the end of the prosecution's case.

Decision

[27] The appeal against the decision of the Sessions Court in acquitting and discharging the respondent at the end of the prosecution's case is dismissed and that decision is thereby affirmed.